Halsbury's Laws of England, 3rd Edn., Vol. 16 at p. 35 states:

> The Court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

See also *Monk v. Bartman* [1981] 1 QB 346 CA which echoes the same principle.

But the power of the Court to stay is limited in its scope. This is supported by a passage appearing in 17 **Halsbury's Laws of England** (4th Edn.) [1976] para 451 at p. 270:

> ... the Court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself.

Thus, grounds affecting the validity or correctness of the consent judgment are not special circumstances. This is because, as was said by Lord Esher MR in *Atkins v. GW Ry* [1886] 2 TLR 400: "strong grounds for an appeal is no reason for a stay of execution, for no one ought to appeal without strong grounds for doing so." In my judgment, neither merits or strong grounds for an appeal nor the validity or correctness of the judgment appealed from are special circumstances which would entitle the appellant to a stay of execution.

There is another point that needs mention. It is this. The appellant had already vacated the controlled premises and therefore an order to stay execution would be completely academic (*Hoo Hua v. Lee Hin & Ors.* [1985] 1 MLJ 149 SC) and, if I may add, an exercise in futility.

For the reason adumbrated above, the application for a stay of execution was therefore dismissed with costs.

ELECTRONICA SALES & SERVICES PVT. LTD.

v.

SFE MACHINERY SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. D2-22-342-93]
12 NOVEMBER 1993

PRACTICE & PROCEDURE: Order 14 RHC - Whether any triable issues - Whether affidavit in support of application in the proper form - Affidavit in support affirmed by solicitor for the plaintiff - Whether affidavit evidence constitutes hearsay - Whether the court can rely on such evidence - Consideration of O. 14 r. 2 (Form 18), O. 41 rr. 5(1), 5(2) Rules of the High Court 1980 - Whether provisions of Order 41 r. 5(1) applicable to interlocutory proceedings - Post-dated cheques issued by defendant - Cheques dishonoured - Notification to defendant - No denial by defendant - Reliance by plaintiff on letter of admission of indebtedness - Allegation by defendant that letter of admission executed under duress and undue influence - Allegation not raised previously - Whether fatal.

The cause of action against the defendant was based on 3 post-dated cheques drawn by the defendant in favour of the plaintiff which were dishonoured when presented for payment. The defendant received notification of the dishonoured cheques when solicitors for the collecting agent, wrote to the defendant on 20 February 1992 demanding payment for the cheques and again on 9 December 1992 when the plaintiff sent their letter of demand. The defendant did not deny having drawn the 3 post-dated cheques totalling US$2,700 nor that the cheques were issued in payment of the balance sum due on a machine they had purchased from the plaintiff. The plaintiff applied for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 (RHC).

Two issues were raised by the defendant in resisting this application: (1) that the affidavit in support of the application was not in the proper form; (2) that there were no merits to the application. In raising these issues the defendant contended that the affidavit in support affirmed by the instructing solicitor for the plaintiff should have been filed by the plaintiff and none other failing which the evidence constituted hearsay and could not be

relied upon by the Court. The defendant further relied on O. 41 r. 5(1) of the RHC to support their contention.

The plaintiff specifically relied upon a letter from the defendant dated 23 May 1991 confirming: (1) payment of the overdue debt of US$45,000 by monthly payments of US$9,000 each, commencing from June 1991 to October 1991; (2) that as a guarantee for such instalment payments the defendant enclosed 5 post-dated cheques; and (3) that if the debt was not settled in full by the end of October 1991, the plaintiff was entitled to charge interest at the rate of 18% per annum on the unpaid sum. It was the last 3 cheques post-dated to 20 August 1991, 20 September 1991 and 20 October 1991 that formed the subject-matter of these proceedings. The defendant alleged that the said letter dated 23 May 1991 admitting to their indebtedness was executed under duress and undue influence as it was apparently prepared by an agent of the plaintiff.

Held:

[1] Under O. 14 r. 2 of the RHC the affidavit is affirmed pursuant to Form 18 which on close scrutiny envisages that the plaintiff or the solicitors for the plaintiff or the clerk to the plaintiff's solicitor or agent to the plaintiff can affirm such an affidavit, **provided** that in the case of a person who is not the plaintiff , he must swear that he had the authority to make the affidavit on behalf of the plaintiff. In the present case there was nothing wrong with the instructing solicitor for the plaintiff and who had access to all records pertaining to this matter to affirm the affidavit in support of the application on behalf of the plaintiff.

[2] Order 41 r. 5(1) of the RHC was irrelevant to the present proceedings as the provisions of that order and rule refer to substantive pleadings and since the present proceedings were interlocutory in nature the relevant order was O. 41 r. 5(2) of the RHC.

[3] The allegation of duress and undue influence had never been raised before as an issue and the defendant had every opportunity to do so. The first opportunity presented itself when solicitors of the collecting agent wrote to the defendant on 20 February 1992 informing them of the 3 dishonoured cheques and demanding payment for the said cheques. The defendant did not respond to this letter much less accuse the plaintiff that they had been unduly influenced by the plaintiff's agent into agreeing to make the payments. There was also no response by the defendant to the plaintiff's letter of demand dated 9 December 1992. Under the circumstances no weight was given to the defendant's bare accusations particularly when the defendant had not denied having drawn the 3 post-dated cheques nor was there any suggestion that the cheques had been issued under duress or undue influence.

[4] As the issues had all been sufficiently replied to by affidavit evidence the plaintiff's application was allowed with costs and judgment was accordingly entered against the defendant for the sum of US$43,159 with interest at the rate of 18% per annum from 1 January 1993 to date of realisation and costs.

[Application allowed with costs].

Legislation referred to:
Rules of the High Court 1980, O.14 r. 2, Form 18, O. 41 rr. 5(1), (2)

For the plaintiff - Lambert Rasa-Ratnam; M/s. Ponmugam & Co.
For the defendant - Mastura Bt. Ma'sud; M/s. Ariffin & Partners

JUDGMENT

Siti Norma Yaakob J:

The cause of action against the defendant in the present proceedings is based on 3 post-dated cheques drawn by the defendant in favour of the plaintiff which were dishonoured when they were presented for payment. The defendant received notification of the dishonoured cheques when solicitors for the Malaysian French Bank, the collecting agent, wrote to the defendant on 20 February 1992 demanding payment for the 3 dishonoured cheques and again on 9 December 1992 when the plaintiff sent their letter of demand. The defendant did not deny having drawn the 3 post-dated cheques totalling US$2,700 nor did they deny that the cheques were issued in payment of the balance sum due on a machine they had purchased from the plaintiff. At the outset of the plaintiff's application for summary judgment under O. 14 of the RHC Counsel for the defendant requested an adjournment on the ground that the defendant's application for security for costs against the plaintiff had been dismissed by the learned Senior Assistant Registrar. As

this order had no bearing whatsoever on the application before me, I disallowed Counsel's request and proceeded with the hearing.

Two issues were raised by the defendant in resisting this O. 14 application:

(1) that the affidavit in support of the application is not in the proper form; and
(2) that there are no merits to the application.

The affidavit in support is affirmed by SA Ponmugam, the instructing solicitor for the plaintiff and the objection is that such an affidavit should have been filed by the plaintiff and none other. Since the affidavit is not in its proper form the affidavit evidence constitutes hearsay and the Court cannot rely on it.

Under O. 14 r. 2 of the RHC the affidavit is affirmed pursuant to Form 18 which on close scrutiny envisages that the plaintiff or the solicitors for the plaintiff or the clerk to the plaintiff's solicitor or agent to the plaintiff can affirm such an affidavit, **provided** that in case of a person who is not the plaintiff, he must swear that he had the authority to make the affidavit on behalf of the plaintiff. In this case I cannot find anything wrong with SA Ponmugam as the instructing solicitor for the plaintiff and who had access to all records pertaining to this matter to affirm the affidavit in support of the application on behalf of the plaintiff. In this respect the defendant relied on O. 41 r. 5(1) of the RHC which I consider is irrelevant to the present proceedings as the provisions of that order and the rule refer to substantive pleadings and since the proceedings before me were interlocutory in nature, the relevant order is O. 41 r. 5(2) of the RHC.

One of the documents relied upon by the plaintiff is the defendant's letter dated 23 May 1991 confirming:

(1) payment of the overdue debt of US$45,000 by monthly payments of US$9,000 each, commencing from June 1991 to October 1991;
(2) that as a guarantee for such instalment payments the defendant enclosed 5 post-dated cheques; and
(3) that if the debt is not fully settled in full by the end of October 1991, the plaintiff is entitled to charge interest at the rate of 18% per annum on the unpaid sum.

It is the last 3 cheques post-dated to 20 August 1991, 20 September 1991 and 20 October 1991 that form the subject-matter of these proceedings.

The defendant alleges that their letter admitting their indebtedness was executed under duress and undue influence as it was prepared by one S. Thyagarajan, who is the agent of the plaintiff. This allegation of duress and undue influence has never been raised before as an issue and the defendant has had every opportunity to do so. The first opportunity presented itself when solicitors for the Malaysian French Bank, the collecting agent, wrote to the defendant on 20 February 1992 informing them of the 3 dishonoured cheques and demanding payment for the said cheques. The defendant did not respond to this letter much less inform the plaintiff that they had been unduly influenced by the plaintiff's agent into agreeing to make the payments. There was also no response by the defendant to the plaintiff's letter of demand dated 9 December 1992. Under these circumstances I gave no weight to the defendant's bare accusations particularly when the defendant has not denied having drawn the 3 post-dated cheques nor is there any suggestion that the cheques were issued under duress or undue influence.

As the issues have all been sufficiently replied to by affidavit evidence, I allowed the plaintiff's application with costs and accordingly entered judgment against the defendant for the sum of US$43,159 with interest at the rate of 18% per annum from 1 January 1993 to date of realisation and costs.